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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL No. 1492 OF 1999
IN
CHAMBER SUMMONS No. 838 OF 1998
IN
SUIT No. 1610 OF 1992

Raghunath R. Desai)
3, Yamuna, Azad Road, Andheri(E)
Bombay 400 069.) ... Appellant

Vs.

1) M/s. Reliable Industrial)
Corporation, E-72, Bina)
Apartments, 512 M. V. Road,)
Andheri (E), Mumbai 400 069)
)
2) Mr. Jasmin Babubhai Shah)

3) Smt. Malati Jasmin Shah,)
both residing at Flat No.3)
Ground Floor, Yamuna Co-Op.)
Hsg. Soc. Ltd., Azad Road,)
Andheri (E), Mumbai 400 069) Respondents

Mr. M. M. Vashi, Advocate for Appellant.

None for the Respondents.

CORAM : R. M. S. KHANDEPARKAR
AND
D. G. KARNIK, JJ.

DATE ON WHICH JUDGMENT RESERVED : JUNE 7, 2007.
DATE ON WHICH JUDGMENT PRONOUNCED JULY 13,2007.

ORAL JUDGMENT [Per : D.G. KARNIK, J.]:-

. Heard the learned counsel for the appellant. None present for the respondent.

2. This appeal is directed against the judgment and order dated 16th July 1999, passed

by a learned Single Judpuge of this Court, dismissing the Chamber Summons taken out by the appellant for setting aside an exparte decree.

3. The Respondent No.1 "Reliable Industrial Corporation" (for short respondent), which is stated to be a firm registered under the Indian Partnership Act, filed a suit against the appellant bearing Suit No. 1610 of 1992. In the plaint it was alleged that the appellant had borrowed from the respondent certain sum of money and had created an equitable mortgage of his flat bearing Flat No.3, situate in Yamuna Co-Op. Housing Society Ltd. (for short, "the said flat") but had not repaid the loan. The respondent therefore, filed the suit and prayed for money decree of Rs. 14,62,803/- and interest of Rs.1,54,000/-. The respondent further prayed that the said flat be sold under orders of the Court and the proceeds be applied for payment of mortgage dues of the respondent.

4. Though the appellant initially appeared in the suit, he did not file a written statement and did not appear in the Court, when the matter was listed. The Court therefore,

proceeded exparte and passed a money decree in favour of the respondent in terms of prayer Clause (a), and further granted declaration that the suit flat was mortgaged and directed sale of the suit flat for repayment of the mortgage dues.

5. Appellant thereafter took out a Chamber Summons for restoration of the suit and for permission to file written statement and to defend the suit on merits. By the impugned order, the Chamber Summons was dismissed interalia on the ground that the decree passed under Rule 10 of Order VIII of the Code of Civil Procedure (for short the C.P.C.) and therefore, appropriate remedy for appellant was to file an appeal and not an application for restoration under Order 9 Rule 13 of the C.P.C. The learned Single Judge also held that the contention of the appellant that the decree was a nullity as the respondent firm was not registered and or name of the partner of the respondent who had signed and verified the plaint was not shown as a partner in the extract of Registration of the firm and therefore, the firm was not competent to file the suit could not be considered in the Chamber

Summons. The learned Single Judge held that such an objection can be raised only when the decree was put in execution and not in the application for restoration of the suit. Learned counsel repeated the submissions made before the learned Single Judge and further submitted that in any event, as the suit was filed under Order 34 of C.P.C. the trial Court ought to have passed decree permitting redemption of the mortgage by fixing a date for redemption and could only have passed a preliminary decree. Since no preliminary decree was passed, the decision was erroneous and without jurisdiction. He submitted that the learned Single Judge trying the suit had no jurisdiction to pass a final decree for sale of the mortgaged property without giving opportunity to the appellant to redeem the mortgage and therefore, the original decision itself was without jurisdiction.

6. Perusal of the order dated 12th June 1998 by which the suit was decided and decreed shows that the respondent had by way of evidence produced before the trial Court original documents on which the suit was filed. The trial Court also recorded in the order that

he had gone through the documents produced, which clearly indicates that the learned Judge had proceeded to hear the suit exparte and not proceeded under Rule 10 of Order VIII of the C.P.C. The impugned decree is fact and substance an exparte decree. Perusal of the impugned order shows that the learned Single Judge has not considered this aspect of the matter. Since the original decree dated 8th June 1998 is not passed under Rule 10 of Order VIII of the C.P.C.but in fact and substance an exparte decision and decree, the Chamber Summons which was in the nature of an application under Rule 13 of Order IX of the C.P.C. was clearly maintainable. The learned Judge therefore ought not to have dismissed the same on the ground that it was not maintainable and appropriate remedy was to file an appeal against the exparte decision.

7. Bare perusal of the plaint clearly shows that the suit based on a mortgage. By prayer Clause (a), the respondent had prayed for money decree, and by prayer Clause (b) respondent had prayed for a declaration that the mortgage was valid; by prayer Clause (e), the respondent had prayed for sale of mortgage

property. All the 3 prayers, namely Clause (a), (b) and (e) were granted by the order dated 12th June 1998. Rule 4 of Order 34 of the C.P.C. clearly lays down that in a suit for sale of mortgaged property, the Court shall pass a preliminary decree, directing the defendant to deposit the principal amount, interest and costs, if any, together with charges and expenses properly incurred by the mortgagee. Only if the defendant fails to pay the money so directed, untill a final decree can be passed under Rule 5 of Order 34 of the C.P.C. We notice that no preliminary decree has been passed but directly a final decree has been passed, directing sale of the mortgaged property in terms of prayer Clause (e) of the plaint . This could not have been done. Obviously therefore, judgment dated 12th June 1998 directing sale of the mortgaged flat was contrary to the provisions of Rule 4 and 5 of Order 34 of the C.P.C. The learned Single Judge therefore ought to have allowed the Chamber Summons and set aside the exparte decree.

9. In view of this, it is not necessary for us to consider other submissions of the

learned counsel for the appellants, including the submission that the decree was a nullity on the ground that partner of the respondent who had signed plaint was not shown to be a partner in the extract of registration of the partnership firm.

10. For these reasons, the appeal is allowed. The impugned order is set aside and Notice of Motion is allowed as follows-

> The judgment and order dated 12th June 1998 passed in Suit No. 1610 of 1992 is set aside and the suit is restored to the file and remanded to the learned Single Judge, for decision in accordance with law.

Sd/- Sd/-

[D. G. KARNIK, J.] [R.M.S. KHANDEPARKAR, J.]